

**FILED**

**JUL 27 2006**

**CATHY A. CATTERSON, CLERK  
U.S. COURT OF APPEALS**

**NOT FOR PUBLICATION**

**UNITED STATES COURT OF APPEALS**

**FOR THE NINTH CIRCUIT**

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

OMAR MORA RIVERA,

Defendant - Appellant.

No. 05-50344

D.C. No. CR-04-01570-NM

MEMORANDUM<sup>\*</sup>

Appeal from the United States District Court  
for the Central District of California  
Nora M. Manella, District Judge, Presiding

Submitted July 24, 2006<sup>\*\*</sup>

Before: ALARCÓN, HAWKINS, and THOMAS, Circuit Judges

Omar Mora Rivera appeals his 41-month sentence for being an illegal alien found in the United States following deportation, in violation of 8 U.S.C. § 1326(a). He contends that evolving Supreme Court jurisprudence has

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<sup>\*</sup> This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

<sup>\*\*</sup> This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

undermined the holding of *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), and that the enhancement of his sentence under 8 U.S.C. § 1326(b)(2) and U.S.S.G. § 2L1.2(b)(1)(A) on the basis of a fact—a prior arson conviction—not proved beyond a reasonable doubt to a jury is unconstitutional because the sentence exceeds the statutory maximum two years. This contention is foreclosed. *See United States v. Beng-Salazar*, No. 04-50518, slip op. 7479, 7485 (9th Cir. July 6, 2006); *United States v. Weiland*, 420 F.3d 1062, 1079 n.16 (9th Cir. 2005).

**AFFIRMED.**